



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

October 24, 1995

Mr. Richard J. Ybarra
Assistant Attorney General
General Counsel Division
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

OR95-1128

Dear Mr. Ybarra:

Your predecessor asked whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 25479.

The Office of the Attorney General (the "OAG") received an open records request for the following records:

Any referrals from the Texas Department of Health or the Texas Department of Human Services to the Dallas regional office of the [OAG] regarding personal care homes within the last five years.

You inform this office that you have agreed with the requestor to interpret the request as one for any documents concerning the specific referrals to the OAG for enforcement actions. *See* Health & Safety Code § 247.044(a), (c) (attorney general may seek temporary restraining order on behalf of Department of Health). The requestor has also specified that she is not interested in obtaining the names of the personal care home residents.¹ You state that you have released to the requestor "numerous documents" in response to her request. However, you seek to withhold certain other records or portions of records pursuant to sections 552.101, 552.107(1), and 552.111 of the Government Code.²

¹Therefore we do not address here whether the names of personal care home residents are subject to required public disclosure.

²In your original brief to this office, you also raised sections 552.103, 552.108, and 552.110. You did not explain why these exceptions apply to the particular records at issue, nor have you addressed the

You contend that the OAG may withhold the names of individuals who filed complainants with the Texas Department of Health ("TDH") or the Texas Department of Human Services regarding the operation of personal care homes pursuant to the informer's privilege, as incorporated in section 552.101 of the Government Code. In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer's privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of *citizens* to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation. [Emphasis added.]

Although the privilege ordinarily protects the identities of individuals who supply information to law enforcement agencies, it also applies to individuals who supply information to administrative officials with a duty of enforcing particular laws, Attorney General Opinion MW-575 (1982) at 2; Open Records Decision Nos. 285 (1981) at 1, 279 (1981) at 1-2; *see also* Open Records Decision No. 208 (1978) at 1-2, including quasi-criminal civil laws, *see* Open Records Decision Nos. 515 (1988) at 3, 391 (1983) at 3. In this regard, we note that section 247.045 of the Health and Safety Code specifically provides for civil penalties for violations of rules adopted by TDH regarding the operation of personal care facilities. Accordingly, we agree that information that identifies *private citizens* who filed complaints against facilities may be withheld pursuant to the informer's privilege wherever this information appears in the requested records. However, the purpose of the privilege is to encourage "citizens" to report wrongful behavior to the appropriate officials. The privilege is not intended to protect the identity of public officials with a duty to report violations of the law. Therefore, the OAG may not withhold information that identifies public employees who filed complaints with TDH in their official capacity.

(Footnote continued)

applicability of these exceptions in subsequent briefs. If a governmental body fails to explain how and why a "discretionary" exception such as section 552.103 or 552.108 applies to requested information, the exception is ordinarily waived. *See, e.g.*, Open Records Decision No. 363 (1983). Further, from our review of the documents submitted to this office, it is not apparent that section 552.110, which protects trade secrets and certain financial information, applies to any portion of these records. Accordingly, we resolve your request solely on the basis of the exceptions that you have specifically addressed: sections 552.101, 552.107, and 552.111.

You also contend that some of the records you seek to withhold are excepted from public disclosure pursuant to the attorney-client privilege. Section 552.107(1) of the Government Code excepts from required public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Rules of the State Bar of Texas."³ See Open Records Decision No. 574 (1990) at 2. Where an attorney represents a governmental entity, the attorney-client privilege protects only the attorney's legal advice and confidential client communications. *Id.*

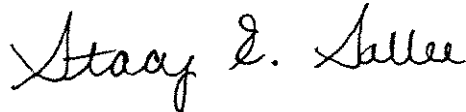
After reviewing the records at issue, we generally agree that these records consist entirely of either confidential attorney-client communications between the OAG and TDH or attorney advice, opinion, or recommendations written "by, to, or under the direction of OAG attorneys" during the course of providing legal services to TDH. However, some of the documents or portions of documents that you have marked as coming under the protection of the attorney-client privilege do not consist of these two types of information. For example, some of the records consist of notes of conversations with individuals other than TDH officials or of meetings where both TDH officials and other non-client individuals were present; the attorney-client privilege does not protect this type of information. See Tex. R. Civ. Evid. 511; Tex. R. Crim Evid. 511 (waiver of attorney-client privilege). Also, you have not met your burden in establishing that certain handwritten notations consist of either client confidences or legal advice or opinion. This office therefore must determine whether section 552.111 excepts that information from public disclosure.

Section 552.111 of the Government Code excepts interagency and intraagency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendations intended for use in the entity's policymaking processes. Open Records Decision No. 615 (1993) at 5. Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. *Id.* at 5. The information that we have determined is not excepted by section 552.107(1) is factual in nature, and may not be withheld pursuant to section 552.111. We have marked the documents and portions of documents that the OAG must release. The OAG may withhold the remainder of those documents pursuant to section 552.107(1).

³We note that the legislature recently amended chapter 552 of the Government Code, effective September 1, 1995. Act of May 29, 1995, 74th Leg., R.S., ch. 1035, § 1, 1195 Tex. Sess. Law Serv. 5127 (Vernon). We do not address how these amendments affect requests received by governmental bodies after September 1, 1995.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in cursive script that reads "Stacy E. Sallee".

Stacy E. Sallee
Assistant Attorney General
Open Records Division

SES/rho

Ref.: ID# 25479

Enclosures: Marked documents

cc: Ms. Christine Wicker
The Dallas Morning News
Communications Center
P.O. Box 655237
Dallas, Texas 75265
(w/o enclosures)